No. 10-795

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

GREEN PARTY OF CONNECTICUT, ET AL.,

Petitioners,

—v.—

ALBERT P. LENGE, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

SANDRA STAUB
DAVID MCGUIRE
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF CONNECTICUT
2074 Park Street, Suite L
Hartford, Connecticut 06106
(860) 523-4196

MARK LOPEZ
Counsel of Record
LEWIS, CLIFTON & NIKOLAIDIS, P.C.
350 Seventh Avenue, Suite 1800
New York, New York 10001
(212) 419-1512
mlopez@lcnlaw.com

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, New York 10004
(212) 549-2500

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I. *BUCKLEY* DID NOT CONSIDER THE BURDEN ON MINOR PARTIES CREATED BY A FUNDING SYSTEM THAT *INCREASES* THE SPEECH AND ELECTORAL OPPORTUNITIES OF MAJOR PARTY CANDIDATES

The opposition briefs filed by the respondents fail to acknowledge the inherent inequality of a public financing system that for all practical purposes increases the speech and electoral opportunities of major party candidates only. In a State characterized by stagnant major party competition, the Citizens' Election Program ("CEP") attempts to increase competition by providing weak major party candidates with the resources and incentive to compete on a level playing field in historically safe legislative districts where they have previously enjoyed little public support, so long as they meet the contribution requirements. App. 273a.-276a, 300a-301a. Minor party candidates who meet the same contribution requirements are arbitrarily denied that opportunity -- unless they also satisfy the prior vote total or petitioning requirements. These provisions work in tandem with the contribution requirements to unreasonably limit minor party participation. In the 2010 cycle not a single minor party or independent candidate received a grant.[1]

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[1] Petitioners acknowledge that there will always be some minor party candidates who are theoretically eligible for funding based on a prior vote total that crosses the 10% threshold. The number will vary from cycle-to cycle and will depend on how many run in single party districts since minor party candidates will rarely qualify in districts that are contested by both major

The respondents do not challenge these facts, but they give them relatively short shrift. Instead, respondents argue that the decision below represents a straightforward application of the principles articulated in *Buckley v. Valeo*, 424 U.S. 1 (1976). Respondents argue that *Buckley* categorically rejects the argument that minor parties are prejudiced under a funding scheme that requires them to satisfy different and more difficult qualifying criteria than their major party opponents. But, *Buckley* did not consider the burden on minor parties by a funding system that lavishes "windfall" amounts of money on "hopeless" major party candidates because that issue was not presented by the presidential financing system. App. 170a, 261a-269a, 300a, 320a, n. 70. To the extent that *Buckley* sheds light on that question, it is helpful to petitioners because the *Buckley* Court clearly understood the presidential financing system as a substitute for marketplace forces. 424 U.S. at 96, n.129. Connecticut's system does not replicate the marketplace; it dramatically skews it in favor of major party candidates. App. 256a-260a.

The CEP provides historically underfunded major party candidates with the resources to run full throttle campaigns—while denying the same benefit to independent and minor party candidates The fact

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parties App 277a-278a However, their performance says little about their relative strength or their ability to raise the contributions necessary to qualify for public financing The relative strength of a minor party candidate who receives 9 9% of the vote in an election contested by both major parties is presumptively much greater. Yet, such candidates are categorically ineligible for funding even though they might have sufficient local or statewide support to raise the necessary qualifying contributions

that the program features a small window of opportunity for minor parties does not alter the fact that the major parties will primarily benefit under the CEP because of the ease with which candidates can qualify for funding that in most cases far exceeds the amount they could raise privately. App 273a-276a. The CEP's qualifying and grant distribution terms are discriminatory not solely because they treat major and minor parties differently, but because the program's terms have the effect of "slant[ing] the political playing field." App. 261a-262a.

Major party candidates are given a permanent statutory preference under the qualifying provisions of the CEP, based solely on the candidate's major party status. The use of one statewide election as a proxy for the actual support of every major party candidate in every district will unjustifiably inflate the strength of historically weak major party candidates by making full public financing available to them, even if they have no chance of winning or could not raise an equivalent amount of money privately. App. 260a-261a, 266a, 317a-318a. *See also,* App.299a-300a ("In a district where a Democrat beats his or her Republican opponent 75% to 25%, no one would argue that the Republican candidate's vote total represented a realistic chance of winning or even a showing of significant strength."). Under the Connecticut system, a party with a statewide plurality can "unfairly disadvantage its opponents [including minor party opponents] in those districts where it enjoys little support." *Bang*

v. Chase, 442 F. Supp. 758 (D. Minn. 1977), *aff'd Bang v. Noreen*, 436 U.S. 941 (1978).[2]

The respondents brush these concerns aside and reject the argument that minor parties are presumed to be disadvantaged under a funding system that "subsidizes" major party candidates -- even if it means providing candidates more money than they could have raised themselves. That is a dubious proposition under *Buckley* and later cases, which do not allow campaign finance laws to be used to give one side of the debate or one group of preferred speakers an unfair advantage. In *Buckley*, this Court expressly noted that the presidential campaign financing scheme "does not enhance the major parties' ability to campaign; it substitutes public funding for what the parties would raise privately and additionally imposes an expenditure limit." 424 U.S. at 96, n.129. Here, by contrast, the evidence shows that the CEP funneled large amounts

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[2] "Upon reviewing the jurisdictional statement in *Bang*, petitioners agree with respondents that the allocation formula was not before the Court when it summarily affirmed the three-judge court decision in that case. Respondents' effort to distinguish away the conflict between this case and *Bang* are unpersuasive, however. The respondents' main point is that Connecticut does not rely solely on a statewide proxy, but also requires candidates to raise qualifying contributions to demonstrate their district wide support. That argument would be more persuasive if minor party candidates in Connecticut could qualify for funding on the same terms as major party candidates. They must satisfy the same contribution standard, but are only eligible for funding if they meet the prior vote total or petitioning requirement, and even then they may only qualify for partial funding. A party's "major party status" is therefore the critical discriminatory factor in the same way that it was in *Bang*.

of money to major party candidates in 2008, thus dramatically enhancing their relative ability to reach the electorate beyond their past ability to raise contributions and campaign. App. 321a-322a. *See also Davis v. Federal Election Com'n*, 128 S.Ct. 2759, 2772 (2008) (finding that increasing the fundraising advantage of one group of candidates imposes a "substantial burden" on the First Amendment rights of candidates denied the advantage); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784-85 (1978) (noting that "the First Amendment is plainly offended" when the legislature attempts to give one group "an advantage in expressing its views to the people"). Most minor party candidates are denied this advantage, even if they raise the requisite number of qualifying contributions.

II. THE BURDEN ON MINOR PARTIES ATTRIBUTABLE TO THE CEP'S FUNDING SCHEME IS FULLY SUPPORTED BY THE RECORD

By subsidizing historically weak major party candidates, the statute exacts a heavy corresponding price on minor parties. They are inevitably worse off as a result because they must now navigate a political field that is both more competitive and expensive. In the future, that will make it increasingly difficult for minor party candidates to replicate anywhere near the same level of success they enjoyed in pre-CEP election cycles, and ultimately more difficult to qualify for public funding, further reinforcing their minor party status. App 267a, 278a. In an effort to discount the burden on minor party candidates, respondents argue that the operation of the CEP has not resulted in any

dilution of the absolute political strength of minor parties by focusing on whether minor party candidates raised less money, ran fewer candidates, faced increased competition or received fewer votes in 2008 following implementation of the CEP. The district court rejected most of the evidence introduced on these issues because it contained numerous inaccuracies. App. 225a, n.28. More importantly, the district court found that respondents' arguments were not credible when considered in the context of the statute's acknowledged legislative purpose of encouraging major party competition and the statute's "readily apparent mechanics." App. 224a., n.27. As the district court recognized, an exclusive focus on ballot access, fundraising results, and vote outcomes tells only one side of the story. The other side of the story is that the CEP has provided significant public funding since 2008 to weak major party candidates in historically single party districts that is unavailable in most instances to minor party candidates. App. 321a-322a. As a result, the district court found, the relative strength of major party candidates has been dramatically increased and the relative strength of minor party candidates has been dramatically diminished. *Ibid.* *See also,* App. 261a-269a (summarizing data).

Agreeing with respondents, the Second Circuit dismissed the district court's finding as "speculative." But, as the district court aptly explained, "[c]onsidering Connecticut's electoral history as a party dominant state," the effects of a public financing system -- which provides "windfall grants" to major party candidates based solely on their affiliation with the party, and which operates

primarily for the benefit of major party candidates – "cannot legitimately be characterized as speculative." App. 320a, n.70). Although the Second Circuit left open the possibility to a later challenge based on a different factual record, the Court's analysis strongly implies that in order for petitioners to succeed they must show that they have been driven from the field. The standard adopted by the Second Circuit leads to the paradoxical result that petitioners can only prevail on their claim by losing at the polls. And, by treating even minimal electoral success as fatal to petitioners' legal claims, the Second Circuit's standard fails to admit the possibility that minor parties might make even greater gains if the major parties were not being subsidized, or if minor parties could participate in the CEP on terms that were not so overtly discriminatory.

III. RESPONDENTS HAVE FAILED TO JUSTIFY THE CEP'S NUMEROUS DISCRIMINATORY PROVISIONS

The respondents do not seriously challenge the fact that Connecticut has the most stringent qualification requirements in the nation. Instead, they cite the familiar description of the states as laboratories in our federal system. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). That familiar metaphor, however, does not license the states to pursue legislative experiments that violate the Constitution. And, in any area so closely touching on core First Amendment freedoms, Connecticut's decision to impose such a high barrier to participation in the public financing system is surely relevant when considering whether those barriers can survive the

heightened scrutiny that is appropriate in this context. Respondents never explain why Connecticut's uniquely burdensome qualification requirements are necessary to protect the public fisc or prevent excessive political factionalism especially since the district court found that "it is more likely that favoring hopeless major party candidates over hopeless minor party candidates will result in a raid on the public fisc..." App.300a.

Nor do respondents dispute the fact that the contribution requirement discriminates on its face. Candidates who satisfy the contribution requirement are not funded equally. The grants for minor-party and petitioning candidates are substantially less -- unless they cross the 20 percent mark for a full grant. The purported justification for holding minor-party and independent candidates to a more difficult qualifying standard than the one that applies to major party candidates is based on the misunderstanding that the Court approved this approach in *Buckley*. But, as noted previously, *Buckley* rested on the understanding that public financing did not act as subsidy, but rather as a "substitute," for what the parties would raise privately, *id.* at 95 n.129, and thus minor parties were not "disadvantaged" by the system, 424 U.S.at 99. Unlike *Buckley*, the CEP's qualifying and grant distribution terms are discriminatory not only because the program's terms treat the parties differently, but because they "slant[ ] the political playing field in favor of major party candidates." App.261a-262a.

The CEP seeks to stimulate major party competition by subsidizing candidates who would not

otherwise have the resources to compete on a level playing field. App.224a, n.27 (summarizing legislative history) To ensure that minor parties do not encroach on the system, Connecticut adopted a standard twice as high as the one approved in *Buckley*, despite the parallel requirement that the candidate must make a preliminary showing of widespread public support by raising thousands of dollars in small dollar contributions, and even though the trial court found that the contribution requirement, by itself, would effectively filter out frivolous and hopeless minor party candidates. App. 310a-31a. Moreover, even if a handful of candidates do qualify, the grants are structured in a way that locks in the advantages of major-party candidates by providing only partial grants, and then making it almost impossible for the candidate to close the funding gap because they are hamstrung by a $100 contribution limit imposed as a condition of receiving the grant and by the minor party trigger provision. App. 287a-289a

Given all this, there can be no doubt that the statute as written, and as applied in the context of Connecticut's history of a party dominant state, departs from the model upheld in *Buckley* in every critical respect. The respondents' only answer is that the legislature's decision to determine the qualifying criteria and grant amounts is entitled to discretion. *Buckley*, however, does not give a state *carte blanche* to devise a system that so demonstrably tilts the field in favor of the major parties.

IV. THE MINOR PARTY TRIGGER PROVISION IS PROPERLY BEFORE THE COURT

As asserted in the petition, the barriers to minor party participation in Connecticut's campaign finance system are reinforced by the CEP's minor party trigger provision, which further tilts the playing field against minority party candidates and thus cannot be reconciled with either *Buckley* or *Davis*. Under this provision, minor party contributions that reach a threshold level trigger an additional public grant to participating major party candidates that can be twice as large as the amounts raised by the minor party. App. 33a The district court found that this provision discourages minor party candidates from participating, or even attempting to participate, in the CEP. App 287a-289a. The respondents do not seriously challenge this characterization of how this provision operates. Instead, they argue that there are prudential considerations why the Court should not intervene. In addition, the respondents argue that the issue is unrelated to the issue currently before the Court in *McComish v. Bennett*, 611 F.3d 510 (9th Cir. 2010), *cert. granted*, __ S.Ct. ___ (Nov. 29, 2010) (No. 10-239). Neither of these arguments has merit.

The intervenor-respondents argue that the constitutionality of the minor party trigger provision is not properly before the Court because it was not raised or decided below. That assertion is incorrect. Plaintiffs prevailed on this issue in the district court. App. 287a-289a. The state-respondents specifically raised the issue on appeal. Petitioners then filed their response and, in a sub-section addressed solely

to this provision, explicitly argued that it unjustifiably discriminated against minor party candidates by serving as a "strong incentive to avoid raising contributions or spending [their] own money in excess of the applicable qualifying contribution minimum, whether or not that candidate hopes to become eligible for the CEP." *Appellees' Brief* at 90-91.[3] Petitioners further argued that once this provision was triggered, minor party candidates who qualified for partial grants could not realistically close the funding gap because they were bound by the $100 contribution limit. *Id.* The trial court found that this provision alone and in combination with the other provisions of the statute reinforces the statute's discrimination and "severely burden minor party candidates' political opportunity." App. 287a-289a.

The Second Circuit did not address either of these issues in its opinion. Its failure to do so, however, cannot justify leaving intact a provision whose legitimacy is called into question by the holding in *Davis*, and which involves an issue currently before the Court in *McComish*. That case involves the application of *Davis* to the trigger provisions contained in Arizona's campaign finance law. Recognizing that the legitimacy of these types of trigger mechanisms is in doubt, the respondents strain unsuccessfully to make the case that Connecticut's minor party trigger provision is unrelated to the matching fund provisions in

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[3] Even respondents appear to concede that the issue was raised below by quibbling instead over whether petitioners placed their objection in the appropriate section of their brief below (as deemed by respondents)

McComish. If anything, the Connecticut provision is significantly more onerous. In Arizona, participating candidates receive a 1:1 match once a non-participating opponent exceeds the initial public grant. The triggering event under the CEP occurs once a minor candidate has raised only a small fraction of the amount of money his publically financed opponent is allowed to spend on the election, at which point the full amount of the supplemental grant is paid. App. 287a-289a. This yields a more than 2:1 match.

Contrary to the respondents' argument, the Second Circuit's failure to address the operation of the minor party trigger provision provides a separate but related basis for review of this case. At a minimum, the final decision in this case should be held pending a final decision in *McComish*.

CONCLUSION

For the reasons stated above and in the petition, the writ of certiorari should be granted.

Respectfully submitted,

Mark Lopez
Counsel of Record
Lewis, Clifton
& Nikolaidis, P.C.
350 Seventh Avenue, Suite
1800
New York, NY 10001
(212) 419-1512
mlopez@lcnlaw.com

Steven R. Shapiro
American Civil Liberties
Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500

Sandra Staub
David McGuire
American Civil Liberties
Union Foundation
Of Connecticut
2074 Park Street, Suite L
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